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IN THE

Supreme Court of the United States

No. 307

October Term, 1946.

PARE LORENTZ,

Petitioner,

vs.

R. K. O. RADIO PICTURES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States of America:

The petitioner, Pare Lorentz, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court entered on April 22, 1946 [R. 155, 165] affirming a judgment of the United States District Court for the Southern District of California, Central Division. [R. 141-143.]

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (Circuit Judges Garrecht, Denman, and Stephens, Judge Stephens writing the opinion) was filed on April 22, 1946. [R. 155, 164.] It appears at pages 156-164 of the Record. It had not been reported at the time this petition was prepared. The judgment of the District Court was entered March 2, 1945. No opinion was delivered. [R. 141-143.]

Statement of the Jurisdictional Grounds.

1. The judgment sought to be reviewed was entered in the Circuit Court of Appeals on April 22, 1946. [R. 155, 165.]

2. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code. (Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938; 28 U. S. C. A. sec. 347(a); U. S. Comp. Stats. sec. 1217(a).)

Statement of the Matter Involved.

A. Questions Presented.

1. Can an employer wrongfully discharge an employee, and concurrently with such wrongful discharge, make malicious and untruthful statements to the press about the employee with the intention that they should be published in the United States and elsewhere to the effect that the employee, who had been engaged as a writer, producer and director, and placed in charge of a certain motion picture production, had so substantially exceeded the allotted budget for the motion picture, which was still in the process of production, that it was necessary for the employer to stop the production of the motion

picture, but that the employer hoped the employee could be pursuaded to return and complete the motion picture on a reduced budget, as a consequence of which statements, substantial injury was caused to the employee's reputation in his profession, without being liable to the employee in damages, compensatory and punitive, for defamation.

2. When in an employment contract, an employer agrees that the employee, in consideration for his services, shall receive:

(a) Credit as a producer and director on the main title of positive prints of each picture and in trade paper advertising;

(b) Contingent compensation in the sum of a percentage of the profits;

(c) Fixed compensation;

but requires the employee in said contract to waive all claims against employer based upon:

(1) Failure to utilize employee's services;

(2) Failure to utilize the results of employee's services;

(3) Failure of employer to produce the picture;

(4) Failure of employer to release the picture;

(5) Failure of employer to continue to distribute the picture.

provided that nothing in the waiver should be deemed to relieve the employer of its obligation to pay the employee the fixed compensation,

may the employer wrongfully discharge the employee, and, *not having paid* the fixed compensation as required by the agreement, limit the recovery of the employee in an action for wrongful discharge to such fixed compensation, and thereby receive complete immunity from liability for damages arising from its promises, wrongfully broken, to give the employee screen credit and a percentage of the profits?

B. Statement of Facts.

This statement of facts is based upon the allegations of the complaint, all of which are deemed to be admitted since the judgments appealed from were based upon a motion for summary judgment and a motion for dismissal. [R. 138-143.]

In August, 1941, petitioner entered into a written contract of employment with R. K. O. Radio Pictures Inc., a corporation, whereby he was employed as writer, director, and producer in connection with two motion picture photoplays, the production of the first to commence within one year. [R. 3-4.] Under the terms of the contract petitioner was to receive as compensation: (a) fixed compensation of $50,000.00 for each picture at the rate of $1250 per week for forty weeks, (b) should commencement or completion of the photography of a picture be delayed by fault of the corporation, $1250 per week for each week over forty required to complete the picture (but not for longer than the aggregate of the periods of delay caused by the corporation), (c) 10% of the net profits of each picture, (d) credit as producer and director of the pictures on the screen and in trade paper advertising. [R. 3-4.]

Included in Section 1 of the written contract of employment was the following provision:

> "28. The Producer expressly waives and releases the Corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section II of this agreement." [R. 78.]

Petitioner was assigned to the production of the first picture by the corporation in August, 1941. [R. 4-5.] The picture was to be based upon a story entitled "Ecce Homo" which petitioner had previously written. [R. 4-5, 11-12.] Petitioner worked on the writing, direction and production of this picture from August, 1941, until on or about July 14, 1942. On that date the corporation wrongfully discharged petitioner [R. 5], having paid him for only 40 weeks of service at $1250 per week. [R. 5, 11.] Petitioner had duly performed all of the terms of the contract on his part. [R. 4.] By wrongfully discharging petitioner on said date, the corporation prevented petitioner from completing the production of the first picture. [R. 5.] The completion of the picture would have required approximately twelve additional weeks, thereby constituting a total period of approximately 60 weeks for production of this picture. [R. 5.] The

delay of 20 weeks over and above the basic period of 40 weeks was entirely the fault of the corporation. [R. 5.] The corporation did not make any additional payments to petitioner on account of the first picture, and has failed to carry out the terms of the contract with regard to the production of a second picture. [R. 5, 11.]

At approximately the same time the corporation wrongfully discharged petitioner, in July, 1942, the corporation willfully and maliciously made to the press certain statements about petitioner knowing these statements would be, and intending that they should be, published throughout the United States and elsewhere. [R. 27.] The statements were widely published in the press. [R. 30-31.] These statements were false in their entirety. The corporation knew they were false and made the statements maliciously. [R. 27, 31.] The statements were as follows:

> "that there had already been expended in the production of the first picture, prior to the time the Corporation ordered plaintiff to stop production of said Picture, approximately four hundred thousand dollars ($400,000.00); that a total of four hundred thousand dollars ($400,000.00) was all that was allotted for the entire production of said picture; that an additional four hundred thousand dollars ($400,000.00) would be required to complete said Picture; and that the corporation hoped that plaintiff would be persuaded to return and finish said Picture on a reduced budget." [R. 27.]

Prior to said statements, petitioner's professional reputation was good. [R. 27.] Said statements, however, have greatly injured and prejudiced petitioner's professional reputation and caused him substantial loss. [R. 31.]

Petitioner then commenced an action in the District Court for the Southern District of California, Central Division, against the corporation on October 27, 1942. Petitioner was, and is, a citizen of the State of New York, and the corporation was, and is, organized and existing under the laws of the State of Delaware, with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California. [R. 2.]

The complaint in the action filed against the corporation by petitioner included, among others, the following causes of action:

> Second Cause of Action: to recover the additional fixed weekly compensation which petitioner would have earned from the corporation in completing the first picture if the corporation had not broken the contract. [R. 10.]
>
> Tenth Cause of Action: to recover the percentage compensation which petitioner would have earned on the profits from the first picture had the corporation not broken the contract. [R. 24-25.]
>
> Eleventh Cause of Action: to recover the percentage compensation which petitioner would have earned on the profits from the second picture if the corporation had not broken the contract. [R. 25-26.]

Twelfth Cause of Action: to recover damages for the corporation's failure to accord petitioner credit as producer and director on the screen and in trade paper advertising. [R. 26.]

Thirteenth Cause of Action: to recover damages for the defamation of petitioner by the corporation. [R. 26-31.] In this cause of action, petitioner pleaded the following innuendo:

> "By the aforesaid statements made by the Corporation, the Corporation intended to assert and to be understood as asserting, and the Corporation did in fact assert and by the readers of said newspapers was understood as asserting, that excessive moneys had been spent on the production of the First Picture by reason of plaintiff's incompetence as a writer, director and producer of motion pictures; that plaintiff was incompetent as a writer, director and producer of motion pictures; that plaintiff was unwilling to cooperate with the Corporation and was unmindful of the Corporation's desire to do business at a profit, and refused to cooperate with the Corporation by eliminating avoidable expenses in the continued production of said Picture; and that the Corporation was compelled to abandon the production of said Picture because plaintiff was incompetent and was unwilling to cooperate with the Corporation to reduce cost." [R. 30.]

C. Rulings of the Courts Below.

1. The District Court granted a motion for summary judgment as to the second, tenth, eleventh and twelfth causes of action stated in the complaint, and entered summary judgment accordingly, on the ground that Article 28 of Section 1 of the contract between the parties "constitutes an effective waiver and release of the claims set forth" in said causes of action. [R. 139-142.] The District Court granted a motion to dismiss the thirteenth cause of action stated in the complaint, and entered a judgment dismissing said cause of action without leave to amend, on the ground that it failed to state a cause of action for defamation. [R. 139-40, 143.] The District Court entered its judgments in favor of the corporation on the above stated causes of action on March 2, 1945. [R. 141-43.]

2. The Circuit Court of Appeals for the Ninth Circuit affirmed these judgments on April 22, 1946 [R. 155, 165], holding that the thirteenth cause of action did not state a cause of action for defamation, and that Article 28, Section 1 of the contract between the parties constituted a binding waiver and release of the claims set forth in the second, tenth, eleventh and twelfth causes of action. [R. 156-164.]

REASONS FOR GRANTING THE WRIT AND ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Appears to Be in Conflict With Decisions of Other Circuit Courts of Appeals.

The decisions of other Circuit Courts of Appeals establish the rule that if an allegedly defamatory statement is capable of two meanings, one of which is defamatory and the other of which is not, a good cause of action for defamation is stated and the matter must be submitted to the jury to detemine whether the statement was in fact defamatory. (*Meyerson v. Hurlburt,* 98 F. (2d) 232 (1938, C. C. A., Dist. of Columbia); *Washington Times Co. v. Murray,* 299 Fed. 903, 905 (1924, C. C. A., Dist. of Columbia); *Culmer v. Canby,* 101 Fed. 195, 196-97 (1900, 6 Cir.); *Commercial Publishing Co. v. Smith,* 149 Fed. 704, 706-7 (1907, 6 Cir.). See, also, *Washington Post Co. v. Chaloner,* 250 U. S. 290, 293, 39 Sup. Ct. 448, 63 L. Ed. 987; *Peck v. Tribune Co.,* 214 U. S. 185, 53 L. Ed. 960; *DuPont Engineering Co. v. Nashville Banner Publishing Co.,* 13 F. (2d) 186, 191 (1925, D. C. M. D. Tenn.).

In *Meyerson v. Hurlburt, supra,* the court states (p. 234):

> "Which meaning the words conveyed was not a question for the court. If language 'is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say,

> under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.' Washington Post Co. v. Chaloner, 250 U. S. 290, 293, 39 Sup. Ct. 448, 449, 63 L. Ed. 987, quoting Commercial Publ. Co. v. Smith, 6 Cir., 149 Fed. 704, 707. King Kullen Grocery Co. v. Astor, Second Department, 249 App. Div. 655, 291 N. Y. S. 448."

In its opinion in the present case the Circuit Court of Appeals sustains the judgment dismissing the cause of action for defamation on the ground that it is *"more reasonable"* to ascribe an innocent meaning to the alleged statements than a defamatory meaning. The court states [R. 162]:

> "An explanation in regard to stoppage of production was not unreasonable, and *it is far more reasonable to infer* from the explanation made that the corporation had expected the picture to be produced for $400,000 but instead another $400,000 would probably be necessary, and the corporation hoped appellant would return and that a means would be devised to lessen the cost." (Italics added.)

This ruling of the Circuit Court of Appeals is clearly contrary to the established rule in other Circuit Courts of Appeals as indicated by the above cited cases. It is not the function of the Court to determine which of two possible meanings, one innocent and one defamatory, is *more* reasonable. The reasoning of the Circuit Court of Ap-

peals in this case is pregnant with the admission that the statements claimed to be defamatory in this case *are susceptible* of a defamatory interpretation, *i. e.:* that they tend to injure petitioner in his business or profession (see *Meyerson v. Hurlburt, supra;* Restatement, Torts, Secs. 569(e), 573; Harper, Torts (1933), Secs. 241, 243), although such an interpretation is not *as* reasonable to the Court as a non-defamatory one. This is an implicit recognition that the statements are susceptible of two interpretations, one defamatory in that they tend to injure petitioner in his business or profession, and the other non-actionable. Since the statements are capable of a defamatory meaning a cause of action is stated and the matter must be submitted to the jury for decision.

The opinion of the Circuit Court fails to set forth in detail the innuendo pleaded by petitioner indicating the defamatory meaning which may be ascribed to the alleged statements. The opinion fails to discuss the fact that the alleged defamatory statements were made in connection with the wrongful discharge of petitioner by the corporation, and the opinion further fails to discuss the fact that the alleged defamatory statements were wholly untrue and were maliciously made.

II.

The Circuit Court of Appeals Has Decided an Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions.

The California decisions make it clear that the same rule obtains in California as that established in the federal courts by the decisions of the Circuit Courts of Appeals cited *supra,* namely, that if an allegedly defamatory statement is capable of two meanings, one of which is defamatory and the other of which is not, a good cause of action for defamation is stated and the matter must be submitted to the jury to determine whether the statement was in fact defamatory. (*Gallagher v. Chavalas,* 48 Cal. App. (2d) 52, 11 P. (2d) 408; *Bonestall v. Shaw,* 28 Cal. App. 226, 229, 151 Pac. 1149; *Tonini v. Cevasco,* 114 Cal. 266, 273, 46 Pac. 103; *Kedrolivansky v. Niebaum,* 70 Cal. 216, 218, 11 Pac. 64.)

In *Gallagher v. Chavalas, supra,* the court states (pp. 57-58):

> "With respect to the question of the sufficiency of a complaint based on said section it is held that where the defamatory utterances are actionable in themselves no innuendoes are necessary, but that if the words have some occult meaning or local signification, or the meaning is ambiguous and susceptible of a harmless as well as an injurious effect, innuendoes are essential to point out the meaning which the plaintiff claims to be the true one, and on which he relies to sustain his action (16 Cal. Jur. 88); and 'if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it is properly the province of the jury to say whether they were in fact so understood.' (Newell on Slander and Libel, 4th Ed., p. 589.) * * * In other words,

> the general rule is that before a demurrer to a complaint containing innuendoes may be properly sustained it must appear that the publication is not reasonably susceptible of the defamatory meaning and cannot reasonably be understood in the defamatory sense pleaded; and that where the words used are susceptible of more than one meaning, one of which is the libelous meaning placed upon them by the plaintiff in the allegations of his complaint, then the question of whether the words are defamatory or of innocent import should be left to the jury for determination under proper instructions, even though the covert meaning ascribed to them be improbable. (Toomey v. Jones, 124 Okl. 167, 254 Pac. 736, 51 A. L. R. 1066; Washington Times Co. v. Murray, 55 App. D. C. 32, 299 Fed. 903, and authorities cited therein; Pfitzinger v. Dubs, 64 Fed. 696, 12 C. C. A. 339; Culmer v. Canby, 101 Fed. 195, 41 C. C. A. 302; Newell on Slander and Libel, *supra.*)"

The ruling of the Circuit Court of Appeals, therefore, that the complaint did not state a good cause of action for defamation because the possible innocent meaning of the alleged statements was in its opinion "more reasonable" than the defamatory meaning, set forth by innuendo in the complaint, is clearly in conflict with the established rule in California. Under California law, a statement is defamatory if it tends to injure a person in his business or profession (Cal. Civil Code, Secs. 45, 46, both set forth in full in the Appendix, *post*) and if it is possible to ascribe a defamatory meaning to allegedly defamatory statements, a good cause of action for defamation is stated and the matter must be submitted to the jury, however improbable it may appear to the court that such was the actual meaning conveyed.

III.

The Circuit Court of Appeals Has Decided a Second Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions.

It is firmly established in California that a material failure of performance by one party, where not justified, amounts to a failure of consideration, and discharges the other party from his duty to give the agreed exchange, even though his promise is not conditional. (*Bray v. Lowery,* 163 Cal. 256, at 261, 121 Pac. 1004; *Shipley v. Rosemead,* 100 Cal. App. 706, 280 Pac. 1017; *American National Bank v. Summerville,* 191 Cal. 364, 216 Pac. 376; see cases cited in California Annotations to Restatement of Contracts, sec. 274.)

This principle has been applied by the California courts to provisions in contracts having the effect of a release. If there has been an unjustified failure of performance by one party to the contract, amounting to a failure of consideration, a provision in the contract having the effect of a release will not be enforced against the other party. (*Miller v. Brode,* 186 Cal. 409 at 416. 199 Pac. 531; *Rogers v. Kimball,* 121 Cal. 247 at 253-54, 53 Pac. 648; *Upper San Joaquin Canal Co. v. Roach,* 78 Cal. 552 at 555, 21 Pac. 304; *Wheelock v. Pacific Pneumatic Gas Co.,* 51 Cal. 223 at 226.)

In its opinion in the present case the Circuit Court of Appeals holds that Article 28, Section 1, of the contract between the parties operates to release the corporation from any liability to petitioner for failure of the corporation to utilize the services of petitioner or for failure of the corporation to produce, release, or distribute either

of the pictures, even though the corporation, in violation of the second clause of Article 28, refused and failed to pay petitioner a portion of his fixed compensation for the first picture and all of his fixed compensation for the second picture, thereby constituting a material failure of performance on the part of the corporation amounting to a failure of consideration. The Circuit Court holds petitioner to his part of the bargain despite the fact that the corporation has wrongfully failed to perform its part. In considering this issue the Circuit Court merely states in its opinion:

> "The fact that the fixed compensation had not been paid in full at the time the action was brought did not constitute a failure of consideration. Non-payment is not synonymous with failure of considera-ation."

The Circuit Court cites no authority for this rather startling conclusion of law, which is directly contrary to the California cases cited *supra.*

Even superficial familiarity with the motion picture business makes clear the purpose of Article 28. The employer knows that credit to a writer, producer or director (and in this case petitioner was all three) on a well-made picture, whether substantially successful commercially or only partially so, is of vital importance to the employee. Credit is the life blood of those whose services build pictures. Credit clauses in contracts cause as much wrangling, if not more, than those which fix compensation. The investment in the picture, however,

is that of the employer, or it is responsible for the investment. The employer, therefore says in effect, to the employee:

> "Although we have contracted to give you credit and percentage compensation in addition to fixed compensation, we want you to understand that as long as we pay the fixed compensation, we do not have to use your services or the results thereof, and we do not have to produce a picture with you, or, if we start we can stop, or if you finish a production we do not have to release the picture, or if we release it we can withdraw it from distribution, and you can't sue us for your failure to get the credit or the profit percentage promises."

Petitioner concedes that this attitude on the part of the employer is reasonable. Petitioner concedes that if the fixed compensation provided for in the contract had been paid, that the corporation could successfully assert under Article 28 that the petitioner had waived his rights to sue for damages because of failure to receive credit or percentage compensation.

Petitioner's sole point is that the corporation cannot eat its cake and have it.

At the time of petitioner's discharge, the corporation had an election. It could take advantage of Article 28 and pay as required by the article, the fixed compensation due to petitioner under the contract, and thus win complete immunity from a law suit for damages on the other features of the contract, to-wit, its promise to give

credit and pay percentage compensation; or it could stand on its general legal rights and say in effect to the employee:

> "You have represented that you are a competent writer, producer and director and have contracted to make a picture for us within a certain budget, but you are thoroughly incompetent and do not know how to take pictures, and you haven't stayed within the budget. You are fired."

The Corporation elected to exercise the latter right. Petitioner concedes for the purposes of this argument that the corporation had the second right as well as the first.

Petitioner's position is that, having exercised the second right, the corporation must prove the facts which support it as a defense to the very action which is pending. If justification is proved, petitioner will, of course, receive nothing. If, however, petitioner proves (and for the purpose of this appeal it is proved) that the discharge was wrongful, corporation cannot claim the waiver set forth in Article 28, because by failure to pay for it as it contracted to do, the waiver never comes into operation. It is fair to assume on the record of this case that the corporation did not desire to exercise its right to acquire immunity under Article 28 because it felt it had a complete defense to any action petitioner might bring without paying the unpaid fixed compensation on the first and second pictures, which amounted to approximately seventy thousand dollars ($70,000.00).

The Circuit Court's statement that "non-payment is not synonymous with failure of consideration" indicates confusion. There is no question that a promise to pay for services is adequate consideration for a promise to render

them, but failure to pay, *i. e.*, failure of performance, excuses the rendition of the services. In the same way the promise to pay fixed compensation for the waivers set forth in Article 28 was an adequate consideration for the making of that particular contract, but failure to perform the promise and pay the fixed compensation renders the waivers unenforcible.

If the Circuit Court is right in its opinion, it gives judicial immunity to sheer and obvious trickery, because, under the judgment appealed from, a corporation such as the defendant in this case may merely promise to pay compensation for a certain waiver, and even if it refuses to pay and does not pay as in the instant case, it has nevertheless limited its liability as *if it had paid. Why should it pay?* By some legal legerdemain the corporation is permitted to make reckless promises as to credit and percentage compensation, and is given complete legal immunity from liability for a breach of those promises (irrespective of any bad faith and wrongfulness in the breach) for exactly nothing.

To illustrate further, if the corporation in this case had permitted the completion of the picture and distributed it, but through complete inadvertence had given credit to petitioner less than and not in accordance with the contractual provisions, the corporation would unquestionably be liable for damages. Under the Circuit Court opinion, however, if the corporation wrongfully and in bad faith stops the picture production, making it impossible to give the promised credit, it is not liable under Article

28 in its contract, and the employee, by grace of the provisions of Article 28, is permitted to sue for fixed compensation which the employer had promised to pay for its immunity from a suit for breach of the credit and percentage profit clauses. Such a conclusion, it is submitted with deference, is neither law nor common sense.

Conclusion.

For the reasons just noticed it is respectfully submitted that this petition should be granted.

WALTER S. HILBORN,
Attorney for Petitioner.

LESTER WM. ROTH,
LEONARD G. RATNER,
Of Counsel.

Certificate of Counsel.

I hereby certify that in my judgment this petition is well founded and that it is not interposed for delay.

WALTER S. HILBORN.

APPENDIX.

Cal. Civ. Code, Sec. 45:

"Libel, what is. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Cal. Civ. Code, Sec. 46:

"Slander, what is. Slander is a false and unprivileged publication other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to him impotence or a want of chastity; or

5. Which, by natural consequence, causes actual damage."